

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1479

Cir. Ct. No. 2006FA971

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

MARY BETH TRENTADUE,

PETITIONER-RESPONDENT,

V.

CHRISTOPHER ALLEN TRENTADUE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Christopher Trentadue appeals from a circuit court order disposing of multiple motions affecting the placement of and child support

for his minor children and awarding his former spouse, Mary Beth Trentadue, reasonable attorney's fees for overtrial. We affirm.

¶2 The Trentadues were divorced in 2007. Christopher's challenges in this appeal arise from the circuit court's February 15, 2011 order memorializing rulings made at a February 11 status hearing. At that hearing, the guardian ad litem and the family court services social worker reported that in July 2010, Christopher was recorded using vile language in front of his children and telling his children that he "[was] going to kill [Mary Beth]." The guardian ad litem advised the court that Christopher repeated this conduct in a recent telephone conversation with her, prompting her to contact law enforcement. Based upon its concern for the children, the circuit court determined that it was in the children's interest to temporarily suspend Christopher's placement pending a hearing one week later.¹ The court noted that Christopher was not present at the February 11 hearing, but Christopher had notice of the hearing and had decided not to appear.

¶3 At the February 17 hearing, Christopher and Mary Beth appeared. The guardian ad litem requested limited placement for Christopher while he pursued court-ordered counseling. Christopher did not object to the previous suspension of his placement or to the plan for counseling and limited placement. The court modified the placement suspension to allow Christopher limited placement with the children.

¶4 At a March 10 hearing, the parties alerted the court to an agreement to increase Christopher's placement. Christopher did not object. Christopher also

¹ Prior to the February 11, 2011 hearing, the parties had equal placement.

did not raise an objection regarding placement at a May 11 hearing. At a June 16 hearing, Christopher requested psychological evaluations and a hearing on custody and placement issues.

¶5 On appeal, Christopher argues that the circuit court should not have suspended his placement on February 11 in response to the guardian ad litem's report of his vile outbursts and his threat to kill Mary Beth. We do not address this issue because from February 17 to June 16, Christopher did not object to the placement arrangements or seek a hearing relating to those arrangements. In the intervening hearings, the parties reported to the court that they had agreed to increase Christopher's placement, which the court had suspended entirely on February 11.² We conclude that a decision on the February 11 placement suspension "cannot have a practical effect on an existing controversy." *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 591, 445 N.W.2d 676 (Ct. App. 1989).

¶6 Christopher next argues that the February 15 order memorializing the February 11 suspension of his placement was not valid. Therefore, all subsequent orders, including child support orders, were also invalid. This issue is not preserved for appeal because, as discussed above, Christopher did not contemporaneously object to the circuit court's placement decisions between the time the court suspended placement (February 11) and June 16, when the court ordered further proceedings on placement and custody at Christopher's urging. More importantly, on February 28, 2011, Mary Beth filed a motion to modify placement and child support. As a result, the circuit court had authority to order child support retroactive

² The appellant's brief should have disclosed what occurred at the subsequent hearings discussed in this opinion. Our review of the record supports our view that the appellant's brief lacks a certain degree of candor.

to the date of Mary Beth's motion, a motion that gave Christopher notice of her intent to seek a child support modification. *See* WIS. STAT. § 767.59(1m) (2011-12)³ (revisions to child support orders cannot be made prior to the date of notice to the opposing party).⁴

¶7 We turn to Christopher's challenge to the circuit court's award to Mary Beth of \$25,000 in attorney's fees for overtrial. After numerous proceedings on the parties' competing motions relating to custody, placement and child support, the court found that "[e]xcessive trial time was expended on the issue of high school and attendance." The court held Christopher responsible for the excessive litigation because he did not act in the children's best interest when he attempted to enroll his children at another high school without conferring with Mary Beth. The court found that all of the trial time spent on the high school attendance issue was unnecessary and resulted from Christopher's actions. The court also found that Mary Beth objected to the psychological examinations Christopher requested and, as it turned out, the examinations by two experts retained by Christopher undercut Christopher's positions on key issues in dispute. These experts consumed significant trial time. The court further found that

³ All references to the Wisconsin Statutes are to the 2011-12 version.

⁴ Other than arguing that his child support obligation arose out of void orders, a claim we have rejected, Christopher does not challenge the child support award in any detail. Christopher's appellant's brief describes the challenged child support award as \$17,236 for April 1, 2011, through November 30, 2012. We will not search the record to confirm the accuracy of this description. Accepting Christopher's description of the period covered by the challenged child support award, we note that this period postdates the first placement change on February 11, 2011, and Mary Beth's February 28, 2011 motion to modify child support. In setting child support, the circuit court made findings based upon evidence offered by Mary Beth relating to, *inter alia*, the actual placement of the children during the relevant periods. Because the circuit court did not err in modifying child support, the court did not err when it denied Christopher's motion to reconsider this ruling.

Christopher's approach to the case caused protracted proceedings and consumed significant trial time. He raised issues that did not need to be addressed, and he repeatedly raised other issues the court had previously addressed, such as repeated requests to vacate temporary orders. The court found that Christopher was motivated by his desire to control Mary Beth and the children which caused Mary Beth to incur legal fees. For overtrial, the court required Christopher to pay \$25,000 of Mary Beth's attorney's fees. Christopher sought reconsideration of the overtrial award, which the circuit court denied.

¶8 On appeal, Christopher argues that he did not have notice and an opportunity to be heard on Mary Beth's request for attorney's fees due to overtrial. The record does not bear out this contention.

¶9 As "long as the issue of overtrial is raised at trial or in posttrial briefs and the opposing party is given a reasonable opportunity to respond ... no formal motion hearing is necessary." *Johnson v. Johnson*, 199 Wis. 2d 367, 376-77, 545 N.W.2d 239 (Ct. App. 1996). A party claiming that he or she has been forced to incur substantial additional attorney's fees due to the conduct of the opposing party makes a claim that is, in substance, an overtrial claim. *Id.* at 377. Attorney's fees are awarded for overtrial "to compensate the overtrial victim for fees unnecessarily incurred because of the other party's litigious actions." *Id.* The circuit court must make a determination regarding the reasonableness of the attorney's fees sought. *Id.* at 377-78. Whether to award a contribution to attorney's fees is discretionary with the circuit court. *Id.* at 377.

¶10 At an August 20, 2012 hearing, Mary Beth testified about her accrued attorney's fees, her lawyer's hourly rate, and her request that Christopher contribute to the fees she had incurred since 2010 when she sought an earlier change of

placement as a result of Christopher's conduct. In exhibit 103, Mary Beth set out \$49,575 in accrued fees. Christopher had the opportunity to cross-examine Mary Beth about exhibit 103 and her claim for attorney's fees. Christopher's counsel specifically asked Mary Beth to describe in what ways Christopher caused the proceedings to be unnecessarily protracted. In her testimony, Mary Beth identified some of the same conduct the circuit court later found caused overtrial. In her posttrial brief, Mary Beth raised her overtrial claim. Christopher did not respond to the merits of the overtrial claim. On this record, we conclude that Christopher had notice and an opportunity to respond to Mary Beth's overtrial claim.⁵

¶11 Christopher argues that the circuit court awarded \$25,000 in attorney's fees without making a finding that the fees were reasonable. In ordering Christopher to pay these fees, the circuit court stated:

I am satisfied that's appropriate under the circumstances, that [\$25,000 in fees] represents approximately half of what the totality of [Mary Beth's] legal fees are or will be, and that essentially they were generated because of [Christopher's] response and handling of this case....

¶12 We note that when Christopher sought reconsideration of the overtrial award, he did not allege that the circuit court failed to make a reasonableness determination. He merely argued that he did not have adequate notice and an opportunity to respond to Mary Beth's request for attorney's fees. We will not address Christopher's reasonableness challenge because it is raised for

⁵ We note that Christopher does not challenge the circuit court's findings supporting its decision to award attorney's fees for overtrial. The circuit court's findings that Christopher engaged in and caused excessive litigation are not clearly erroneous. See *Zhang v. Yu*, 2001 WI App 267, ¶11, 248 Wis. 2d 913, 637 N.W.2d 754.

the first time on appeal. *See Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).⁶

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁶ If we were to address this issue, we would conclude that the record supports the circuit court's exercise of discretion on the question of awarding overtrial fees to Mary Beth. *See Liddle v. Liddle*, 140 Wis. 2d 132, 150-51, 410 N.W.2d 196 (Ct. App. 1987) (we will uphold a circuit court's discretionary decision if we can conclude that there are facts of record which would support the court's decision).

